

[REDACTED]

From: Hatchact Update <[REDACTED]@LISTSERV.OSC.GOV>
Sent: Tuesday, November 27, 2018 8:38 AM
To: HATCHACT@LISTSERV.OSC.GOV
Subject: Guidance regarding political activity

The U.S. Office of Special Counsel (OSC) Hatch Act Unit has received several questions lately regarding whether the following constitute “political activity” for purposes of the Hatch Act: (1) strong criticism or praise of a presidential administration’s policies and actions; (2) advocating for or against impeachment of a candidate for federal office; and (3) activity related to “the Resistance” and/or “#Resist.” We are providing the information below to assist you as you advise employees on the Hatch Act. As always, please do not hesitate to contact OSC with any questions that you may have.

1. Is strong criticism or praise of an administration’s policies and actions considered political activity?

Criticism or praise that is directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group is political activity. Absent evidence that the criticism or praise is so directed, criticism or praise of an administration’s policies and actions is not considered political activity. Whether a particular statement constitutes political activity depends upon the facts and circumstances.

Consider, for example, the administration’s recent decision to move the U.S. embassy in Israel to Jerusalem. An employee who strongly criticizes or praises that decision during a workplace discussion with a colleague in the days immediately following the decision is less likely to be engaging in political activity than one making those same statements in the run-up to the next presidential election—when the decision will likely have been out of the news for several years—to a colleague that the employee knows has strong feelings about the subject.

There are no “magic words” of express advocacy necessary in order for statements to be considered political activity under the Hatch Act. Therefore, when a federal employee is prohibited by the Hatch Act from engaging in political activity—e.g., when on duty, in the federal workplace, or invoking official authority—the employee must be careful to avoid making statements directed toward the success or failure of, among others, a candidate for partisan political office.

2. Is advocating for or against impeachment of a candidate for federal office considered political activity?

Yes. Impeachment is the process by which certain federal officials, including the president and the vice president, may be removed from office and disqualified from holding any future “Office of honor, Trust or Profit under the United States.”^[1] We are not aware of any case law establishing whether the disqualification from holding future office applies to the office of the president, but we presume that it does based upon how the term “office of profit or trust” has been interpreted where it appears elsewhere in the Constitution.^[2]

Assuming that disqualification from holding federal office would bar an individual from serving as president, any advocacy for or against an effort to impeach a candidate is squarely within the definition of political activity for purposes of the Hatch Act. Advocating for a candidate to be impeached, and thus potentially disqualified from holding federal office, is clearly directed at the failure of that candidate’s campaign for federal office. Similarly, advocating against a candidate’s impeachment is activity directed at

maintaining that candidate's eligibility for federal office and therefore also considered political activity. Note that activity directed at the success or failure of an impeachment effort regarding someone who is not a candidate for partisan elective office would not be considered political activity.

3. Is activity related to “the Resistance” considered political activity?

To the extent that the statement relates to resistance to President Donald J. Trump, usage of the terms “resistance,” “#resist,” and derivatives thereof is political activity. We understand that the “resistance” and “#resist” originally gained prominence shortly after President Trump's election in 2016 and generally related to efforts to oppose administration policies. However, “resistance,” “#resist,” and similar terms have become inextricably linked with the electoral success (or failure) of the president. During the period when President Trump was not considered by OSC to be a candidate for reelection the terms did not raise any Hatch Act concerns. Now that President Trump is a candidate for reelection, we must presume that the use or display of “resistance,” “#resist,” “#resistTrump,” and similar statements is political activity unless the facts and circumstances indicate otherwise.

Note that this presumption is only relevant to employee conduct that takes place on duty, in the workplace, while wearing an agency uniform or insignia, or while invoking any official authority or influence. Provided that they comply with the Hatch Act's restrictions, employees are free to engage in political activity while off-duty and away from the federal workplace.

More broadly, usages of the terms “resist” and “resistance” that are not directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group are not prohibited by the Hatch Act. For example, an employee would not be engaging in political activity by posting on social media “I must #resist the temptation to eat another donut from the break room.” That said, we do presume that the use or display of the hashtags #resist and #resistTrump, in isolation, is political activity under the Hatch Act.

Please do not send a reply e-mail message to the above-listed address as it is not monitored. However, if you have any Hatch Act related questions, feel free to contact the Hatch Act Unit at 202-804-7002 or send an e-mail to Hatchact@osc.gov.

To unsubscribe from the HATCHACT list, click the following link:
<http://listserv.osc.gov/scripts/wa-OSC.exe?SUBED1=HATCHACT&A=1>

^[1] U.S. CONST., art. I, § 3, cl. 7; *see also* U.S. CONST., art. II, § 4.

^[2] See *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018) (denying defendant’s motion to dismiss and finding that “the text, history, and purpose of the Foreign Emoluments Clause, as well as executive branch precedent interpreting it, overwhelmingly support the conclusion that the President holds an ‘Office of Profit or Trust under [the United States]’ within the meaning of the Foreign Emoluments Clause”); see also 33 Op. O.L.C. 1, 4 (Dec. 7, 2009) (stating that the “President surely ‘hold[s] an[] Office of Profit or Trust’” as that term is used in article I, section 9, clause 8 of the Constitution) (alterations in original).